Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 09-119
	)	
Applications of Atlantic Tele-Network, Inc. and Verizon Wireless	)	File Nos. 0003858521, *et al.*, ITC-ASG-20090616-00286, *et al.*
	)	
For Consent To Assign or Transfer Control of Licenses and Authorizations	)	
	)	

To: The Secretary
Office of the Secretary
Federal Communications Commission

PETITION TO DENY

Chatham Avalon Park Community Council ("Petitioner" or "CAPCC"), by its attorneys and in accordance with the Commission's Public Notice, hereby petitions to deny the applications for consent to assign or transfer control of licenses and authorizations under the above-captioned docket and file numbers.[1] CAPCC submitted a Petition to Deny in the related AT&T-Verizon Wireless proceeding.[2] CAPCC believes that issues raised therein are relevant to the instant proceeding and thus incorporates by reference the *CAPCC AT&T-Verizon Petition to Deny*. A copy of that Petition to Deny is attached hereto as Appendix 1.

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[1] *See Atlantic Tele-Network, Inc. and Verizon Wireless Seek FCC Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 09-119, Public Notice, DA 09-1515 (rel. July 9, 2009).

[2] *CAPCC Petition to Deny AT&T-Verizon Applications*, WT Docket No. 09-104, filed July 20, 2009 [hereinafter "*CAPCC AT&T-Verizon Petition to Deny*"]. Verizon Wireless claims that the proposed AT&T and Atlantic Tele-Network, Inc. transactions will allow it to meet the divestiture conditions of the Verizon-ALLTEL Order, for which reconsideration remains pending. *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17518 (rel. Nov. 10, 2008), *reconsideration pending*.

CAPCC is a community-based organization located in and around Chicago, Illinois, with hundreds of members who are consumers of telecommunications services, some of which are offered by Verizon Wireless or Atlantic Tele-Network, Inc. CAPCC has a long and proud history of advocating for our local citizens and a special interest in promoting the growth and economic development of the African-American and small business communities. The increasing consolidation in the telecommunications industry disserves Petitioner and its members by producing fewer competitive services at higher consumer prices, so CAPCC has recently become active in FCC wireless proceedings. While Petitioner is concerned about industry consolidation in general, in light of its interest in economic development and business activity, this transaction is of particular significance to CAPCC because it, together with the proposed Verizon Wireless-AT&T transaction, would foreclose what could be the last meaningful opportunity for socially disadvantaged businesses to enter the wireless business.

For reasons described in the *CAPCC AT&T-Verizon Petition to Deny*, the Commission should deny the above-captioned applications.

Respectfully submitted,

CHATHAM AVALON PARK
COMMUNITY COUNCIL

By:________________________

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August 10, 2009

APPENDIX 1

CAPCC Petition to Deny

AT&T-Verizon Applications

WT Docket No. 09-104

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless	)	WT Docket No. 09-104
	)	File Nos. 0003840313, *et al.*,
For Consent To Assign or Transfer Control of Licenses and Authorizations, and Modify a Spectrum Leasing Arrangement	)	ITC-ASG-20090552-00244, *et al.* File No. 0003487528
	)	

PETITION TO DENY

CHATHAM AVALON PARK COMMUNITY COUNCIL
8441 South Cottage Grove
Chicago, Illinois 60619

By

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July 20, 2009

SUMMARY

Verizon Wireless has chosen to ignore the Commission's admonition that it should "consider and implement mechanisms to assist regional, local, and rural wireless providers, new entrants, small businesses, and businesses owned by minorities or socially disadvantaged groups in acquiring the Divestiture Assets and/or accessing spectrum, to the extent possible." Instead, Verizon Wireless is proposing to sell the bulk of the assets that it agreed to divest as a condition of its acquisition of ALLTEL to its chief competitor, AT&T.

As a consequence, a divestiture that was intended to reduce the concentration in the wireless marketplace will, instead, further consolidate the position of the two companies that already overshadow their competition. Indeed, if all of the transactions involving Verizon Wireless, AT&T, ALLTEL, and Centennial had been proposed at once, the significant increase in market power for AT&T and Verizon Wireless that will result would have been evident, and it would have been nearly impossible for the Commission to conclude that those transactions would be in the public interest. For this reason, a sale to AT&T is precisely the opposite of what the Commission intended when it adopted the divestiture condition.

Equally important, it is apparent that Verizon Wireless did absolutely nothing to encourage or assist socially disadvantaged businesses ("SDBs") during the bidding process. Verizon Wireless did not offer a right of first refusal or a right to match bids, and did not screen SDB bidders and their specific interests during the bidding process. Thus, despite the Commission's evident concern and well-known policies on diversity, Verizon Wireless adopted a bidding structure that effectively eliminated what may have been the last chance to increase diversity in the wireless marketplace. For that reason, the applications should be denied and Verizon Wireless should be required to conduct a divestiture process that provides appropriate,

meaningful consideration for potential SDB buyers. At a minimum, the Commission should hold its processing of these applications in abeyance while it conducts an investigation of Verizon Wireless's purported auction of the Divestiture Assets.

At the same time, the Commission cannot grant consent to the proposed transaction because neither the Commission nor Verizon Wireless has provided any reasonable basis to conclude that Verizon Wireless has complied with the foreign ownership requirements of Section 310(b) of the Communications Act. As CAPCC demonstrated in the Verizon Wireless-ALLTEL proceeding, the Commission cannot simultaneously permit Verizon Wireless to rely on street addresses to establish citizenship and deny that same opportunity to other Commission licensees and prospective licensees.

As a practical matter, street addresses cannot serve as a proxy for citizenship because they have only a tangential relationship to the citizenship of an entity that owns stock in Verizon Wireless and no relationship at all to the citizenship of entities further up the chain of ownership. Even if the Commission could rely on street addresses, it has utterly failed to provide a reasoned basis for doing so in the case of Verizon Wireless while forbidding other applicants from using mere addresses to demonstrate citizenship. So long as a significant question concerning the basic qualifications of Verizon Wireless to hold radio licenses remains unresolved, the Commission cannot grant the applications.

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Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless	)	File Nos. 0003840313, *et al.*, ITC-ASG-20090552-00244, *et al.* File No. 0003487528
For Consent To Assign or Transfer Control of Licenses and Authorizations, and Modify a Spectrum Leasing Arrangement	)	

To: The Secretary
Office of the Secretary
Federal Communications Commission

PETITION TO DENY

Chatham Avalon Park Community Council ("Petitioner" or "CAPCC"), by its attorneys and in accordance with the Commission's Public Notice, hereby petitions to deny the applications for consent to assign or transfer control of licenses and authorizations and to modify a spectrum leasing arrangement under the above-captioned docket and file numbers. (collectively, the "Divestiture Applications").[1]

CAPCC is a community-based organization located in and around Chicago, Illinois, with hundreds of members who are consumers of telecommunications services, some of which are offered by Verizon Wireless and AT&T. CAPCC has a long and proud history of advocating for our local citizens and a special interest in promoting the growth and economic development of the African-American and small business communities. The increasing consolidation in the

[1] *See AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, Public Notice, DA 09-1350 (rel. June 19, 2009).

telecommunications industry disserves Petitioner and its members by producing fewer competitive services at higher consumer prices, so CAPCC has recently become active in FCC wireless proceedings. While Petitioner is concerned about industry consolidation in general, in light of its interest in economic development and business activity, this transaction is of particular significance to CAPCC because it would result in further excessive consolidation in the wireless industry and foreclose what could be the last meaningful opportunity for socially disadvantaged businesses ("SDBs") to enter the wireless business. Moreover, this transaction also is being proposed even though Verizon Wireless has not complied with previous Commission requirements for compliance with Section 310(b) of the Communications Act, requirements that the Commission has decided to apply strictly to SDBs seeking to obtain Commission authorization.

It is in this context that CAPCC is taking this opportunity, as the Commission urged in the *Verizon-Alltel Order*, to address "the qualifications of the entity(ies) acquiring the Divestiture Assets and whether the specific transaction is in the public interest[.]"[2] For the reasons described below, this transaction does not meet the public interest test.

There are two separate grounds to deny the Divestiture Applications. First, the Divestiture Applications ask the Commission to consent to a transaction in which the two dominant players in the wireless market will swap assets that will allow them to further consolidate their positions in that market. Verizon Wireless, in particular, is seeking this consent despite the Commission's explicit statement in the *Verizon-Alltel Order* that it should seek to sell these assets to "regional, local, and rural wireless providers, new entrants, small businesses, and

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[2] *See Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17518 (rel. Nov. 10, 2008) [hereinafter "*Verizon-Alltel Order*"], *reconsideration pending*.

businesses owned by minorities or socially disadvantaged groups[.]"[3] As shown below, Verizon Wireless made no effort at all to seek out such buyers, instead choosing to sell the vast majority of the divested systems to its chief competitor. Both Verizon Wireless's failure to comply with the Commission's wishes and the nature of the swap it proposes with AT&T justify denial of the Divestiture Applications.

Second, significant questions remain concerning the qualifications of Verizon Wireless to hold any radio licenses, including those it proposes to divest to AT&T under the foreign ownership provisions of Section 310(b) of the Communications Act.[4] As CAPCC demonstrated in its petition for reconsideration in the Verizon Wireless-ALLTEL merger proceeding,[5] Verizon Wireless still has not provided the information necessary to establish its qualifications under established Commission precedent. If Verizon Wireless cannot establish that it complies with Section 310(b), it has no licenses to transfer or assign to AT&T and the Divestiture Applications must be denied.

I. Verizon Wireless Did Not Make a Good Faith Effort to Act Consistently with the Commission's Intent that Socially Disadvantaged Businesses Be Considered as Buyers for the Divested Markets.

CAPCC demonstrated in its petition to deny Verizon Wireless's acquisition of the ALLTEL assets that there are significant barriers to the entry of SDBs in the wireless services marketplace.[6] While the Commission did not fully address those concerns in the *Verizon-Alltel Order*, it did acknowledge their significance.[7] Indeed, the *Verizon-Alltel Order* specifically

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[3] *See id.*

[4] 47 U.S.C. § 310(b).

[5] CAPCC Petition for Reconsideration, WT Docket No. 08-95 et al., filed December 10, 2008, at 17-24.

[6] CAPCC Petition to Deny, WT Docket No. 08-95 et al., filed August 11, 2008, at 19-22 [hereinafter "*CAPCC Petition to Deny Verizon-Alltel*"].

[7] *Verizon-Alltel Order*, 23 FCC Rcd at 17518.

"encourage[d] Verizon Wireless to consider and implement mechanisms to assist regional, local, and rural wireless providers, new entrants, small businesses, and businesses owned by minorities or socially disadvantaged groups in acquiring the Divestiture Assets and/or accessing spectrum, to the extent possible."[8] The record demonstrates, however, that Verizon Wireless chose to ignore this advice.

First, and most obviously, Verizon Wireless is proposing the sale of the overwhelming majority of the divested licenses to the second largest wireless provider in the United States. In fact, it proposes to sell these systems to a company that is supposed to be its most significant business rival, and the sale is part of a series of transactions in which the two companies are selling each other properties to fill in the holes in their coverage.[9] This swap is part of an effort by the two companies to solidify their market positions and to disadvantage smaller competitors. By locking up spectrum across the country, AT&T and Verizon Wireless make it more difficult for other companies to compete, or to create more complete networks of their own. Indeed, if the combined Verizon-ALLTEL, AT&T-Centennial, Verizon-AT&T and AT&T-Verizon transactions had been proposed to the Commission at once, it would have been self-evident that these transactions would have a substantial negative impact on the wireless marketplace, and it would have been nearly impossible for Verizon Wireless and AT&T to convince the Commission that the transactions would be in the public interest. The creation of a *de facto* duopoly in this fashion is anticompetitive and plainly does not serve the public interest.

This concern is particularly significant because Verizon Wireless and AT&T now are being investigated by the Justice Department for anticompetitive activities and abuse of market

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[8] *Id.*

[9] *See* Reuters, *AT&T to buy some ALLTEL assets for $2.35 billion*, May 8, 2009, available at http://www.reuters.com/article/innovationNews/idUSTRE5475E620090509 (describing paired

power.[10] Permitting Verizon Wireless and AT&T to further consolidate the wireless marketplace by trading spectrum would further increase both their ability and incentive to engage their market power, to the detriment of consumers across the country.

Equally important, Verizon Wireless, by proposing to sell the bulk of the licenses it agreed to divest in the *Verizon-Alltel Order* to AT&T, is ignoring the Commission's admonition to seek out new entrants and SDBs when selling the Divestiture Assets. This admonition is, as CAPCC described in the Verizon-ALLTEL merger proceeding, a vital public policy goal given that for many years both the Commission and Congress have sought to increase diversity in the ownership of telecommunications businesses as expressed in Sections 257, 309(i) and 309(j) of the Communications Act.[11] The Commission also has recognized that minorities, in particular, are subject to significant discrimination in the capital markets, which makes it difficult for them to obtain the financial resources necessary to compete effectively for telecommunications authorizations.[12] The specific barriers to entry faced by socially disadvantaged businesses are well known and established; they are facts, not conjecture. Moreover, the Commission has recognized that there is a compelling interest in ensuring diversity in ownership of communications businesses.

The *Verizon-Alltel Order* admonished Verizon Wireless to take heed of these considerations, and Verizon Wireless chose not to do so. The most obvious evidence of this fact is the choice of buyer – AT&T is the antithesis of a socially disadvantaged business. Even Verizon Wireless's choice of buyer for the relatively small number of licenses not purchased by

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transactions involving sale of ALLTEL and RCC assets to AT&T and sale of AT&T assets to Verizon Wireless).

[10] *See* Wall Street Journal, *Telecoms Face Antitrust Threat*, July 7, 2009, available at http://online.wsj.com/article/SB124689740762401297.html.

[11] *CAPCC Petition to Deny Verizon-Alltel*, at 22.

AT&T is a publicly-traded company with no obvious connections to any minority or other socially-disadvantaged ownership. Indeed, it is particularly telling that Verizon Wireless was willing to sell systems with more 800,000 customers to Atlantic Tele-Networks for only $200 million, or about $250 a subscriber.[13] At that price, and even at significantly higher prices, SDBs would have found it extremely feasible to obtain financing for the divested assets, and yet Verizon Wireless did not find a way to sell any assets to SDBs. In fact, there is no evidence that Verizon Wireless took any steps to encourage or assist SDBs that were potential purchasers. The Divestiture Applications do not claim that Verizon Wireless sought out SDBs and failed to attract any responsive bids, and none of Verizon Wireless's previous statements (including its request to the Commission for additional time to negotiate the divestiture) contain any suggestion that SDBs were among those bidders being considered seriously or, for that matter, at all.

Verizon Wireless may well argue that it did nothing to discourage bids from SDBs, but that, ultimately, it determined that a sale to its main competitor was a better fit for its corporate needs. This, of course, ignores the barriers to entry described by CAPCC and acknowledged by the Commission, particularly those that affect an SDB's ability to obtain financing. More important, it would be inconsistent with the Commission's admonition that Verizon Wireless should "consider and implement mechanisms to assist" disadvantaged bidders.[14]

If, for instance, Verizon Wireless demanded that bidders have their financing in place before they bid, that would have been a significant disadvantage for many SDBs, which often have to negotiate deal terms before they obtain financing. If Verizon Wireless had intended to

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[12] *Id.* at 13.

[13] By comparison, the price per subscriber for the assets to be acquired by AT&T was more than $1,500.

[14] *Verizon-Alltel Order*, 23 FCC Rcd at 17518.

assist SDBs, it would have negotiated terms and conditions first, and then given a successful SDB an opportunity to obtain financing. Similarly, a bidding free for all that, by Verizon Wireless' own account, attracted more than 70 bidders is likely to shut out SDBs. If Verizon Wireless had screened bidders to identify SDBs and their specific interests, then taken the time to negotiate with those entities first, the likelihood of success in divesting properties to SDBs would have been much higher.[15] It is apparent that, instead, Verizon Wireless simply took the path of least resistance and did nothing at all to encourage, let alone assist SDBs that were interested in the divested systems. Given the Commission's strong, stated interest in encouraging investment in wireless by SDBs and the specific statements in the *Verizon-Alltel Order* urging Verizon Wireless to provide assistance to SDBs in bidding for the divested markets, this failure is unacceptable.

Finally, the applicants may argue that it is too late to apply these requirements to this transaction, and that any condition on the divestiture had to have been imposed in the *Verizon-Alltel Order*. This is incorrect. First, the *Verizon-Alltel Order* does, in fact, contain language admonishing Verizon Wireless to act in ways that would increase the likelihood of divestiture to SDBs. Second, the *Verizon-Alltel Order* specifically states that interested parties should wait until this proceeding to address questions concerning "the qualifications of the entity(ies) acquiring the Divestiture Assets and whether the specific transaction is in the public interest[.]"[16] The question of whether the transaction should be allowed to go forward when Verizon Wireless

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[15] CAPCC is not seeking a guarantee of a sale to an SDB, merely a fair opportunity. Experience shows that affording such opportunities can have a significant effect. For instance, when the National Football League adopted its "Rooney Rule," requiring teams to interview minority candidates for all head coaching positions, but not requiring minority hiring, the number of minority head coaches hired increased dramatically. G. Garber, *Thanks to Rooney Rule, doors opened*, Feb. 9, 2007, available at http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645 (describing increase in number of minority head coaches after adoption of rule).

ignored the significant issues created by its failure to seek out potential SDB buyers for the divested assets plainly is within the scope of an appropriate petition to deny, particularly given that such issues were called out by the Commission in the *Verizon-Alltel Order*.

Consequently, the Commission should deny the Divestiture Applications and require Verizon Wireless to conduct a divestiture process that provides appropriate, meaningful consideration for potential SDB buyers of these assets. Given the important public policy of increasing diversity in the telecommunications and media industry coupled with the acknowledged barriers to entry, specific action is required to address those barriers. In other proceedings, the Commission has adopted specific measures to do so. For instance, in the Sirius-XM merger, the Commission based its public interest finding, in part, on the combined entity's commitment to make four percent of channel capacity available to entities under minority control.[17] At a minimum, the process here should include, as proposed by CAPCC in its initial submissions on the Verizon-ALLTEL merger, a right of first refusal for SDBs. Only if SDBs are given an appropriate opportunity for meaningful participation in a divestiture sale can the Commission live up to its stated policies of encouraging competition and diversity in the telecommunications industry.

II. At a Minimum, the Commission Should Conduct an Investigation into the Circumstances of Verizon Wireless's Proposed Sales of the Divestiture Assets Before Acting on These Applications.

The facts described above demonstrate that there are significant questions about how Verizon Wireless conducted itself in determining the buyers for the Divestiture Assets. These and other circumstances warrant exercise of the Commission's broad power to investigate

[16] *Verizon-Alltel Order*, 23 FCC Rcd at 17518.

[17] *Applications for Consent to Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc. to Sirius Satellite Radio Inc.*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (rel. Aug. 5, 2008).

actions by its licensees to determine the extent to which Verizon Wireless intended to use the divestiture to extend, not limit, its market power and the extent to which Verizon Wireless has made accurate representations to the Commission and to Congress about the sale process.

The Commission has ample power to conduct an investigation into the facts and circumstances surrounding this transaction, as well as the seemingly intertwined but not yet filed proposed sale of Centennial assets to Verizon Wireless by AT&T.[18] Section 403 grants the Commission the "full authority and power at any time to institute an inquiry . . . in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission[.]"[19] The Commission's Rules provide for the use of investigative tools, such as subpoenas for document production and witness testimony, that increase the Commission's ability to obtain all relevant facts and that are unavailable to parties like CAPCC in proceedings such as this one.[20] This ability to obtain all of the information necessary to see the full picture is essential when the known facts strongly suggest that relevant information is not being provided.

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[18] AT&T's applications to obtain spectrum from Centennial are currently pending. *See, e.g., Applications of AT&T Inc. and Centennial Communications Corp.*, WTC Docket No. 08-246; CC Docket No. 99-200, Public Notice, DA 09-1300 (rel. June 10, 2009). Concurrent with the instant transaction, however, AT&T is selling some of the spectrum it expects to obtain from Centennial to Verizon Wireless. *See* News Release, "AT&T Agrees to Sell Certain Centennial Communications Corp. Assets to Verizon Wireless," May 8, 2009, included in AT&T Notice of Ex Parte Presentations, WT Docket No. 08-246, filed May 11, 2009.

[19] 47 U.S.C. § 403; *see also Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters*, MB Docket No. 08-187, Notice of Inquiry, FCC 09-43, 74 Fed. Reg. 26235, n.1 (rel. May 18, 2009) (explaining that Sections 4(i) and 403 give "the Commission broad authority to initiate inquiries . . ."). The Commission often invokes its Section 403 authority where it concludes that it needs additional information before taking action. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket 05-255, 21 FCC Rcd 2503, 2613 (rel. March 3, 2006); *Broadcast Localism*, Notice of Inquiry, MB Docket No. 04-233, 19 FCC Rcd 12425 (rel. July 1, 2004).

[20] 47 C.F.R. § 1.27; *see also* 47 U.S.C. § 409 (describing investigative tools available to Commission).

In this case, the facts plainly warrant an investigation. As described above, the circumstances of the two transactions between Verizon Wireless and AT&T strongly suggest an intent to use divestitures to strengthen, not reduce, the two companies' positions in the wireless marketplace, to the detriment of competition, other competitors and consumers. Among the questions the Commission should pursue in an investigation are (i) whether the two Verizon Wireless-AT&T transactions are linked to each other; (ii) whether Verizon Wireless already had identified AT&T as the buyer for the Divestiture Assets before it formally started the sale process; and (iii) whether other bids that Verizon Wireless did not accept would have, alone or in combination, yielded a higher purchase price.

Second, there are additional facts that support the need for an investigation. It is CAPCC's understanding that Capitol Hill personnel were told that Verizon Wireless could not give any special consideration to SDBs in the divestiture process because it was conducting a pure auction, yet Verizon Wireless has agreed to sell a portion of the Divestiture Assets Atlantic Tele-Networks at a price per pop that is far below what AT&T is paying.[21] CAPCC also understands that SDBs were informed that, to participate in the sale, they would be required to have made full arrangements for financing, but Verizon Wireless nevertheless agreed to sell some assets to Atlantic Tele-Networks even though it does not have its financing in place.[22] The

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[21] CAPCC also understands that Verizon Wireless suggested in communications with Capitol Hill that it was compelled to conduct an auction, although there was no regulatory requirement to do so, whereas there was Commission direction to seek ways to sell some or all of the Divestiture Assets to SDBs.

[22] *See* News Release, "Atlantic Tele-Network to Acquire Divestiture Properties from Verizon Wireless," June 9, 2009, available at http://www.atni.com/pr_web.php?nd=090609&pr=01 (noting that availability of funds is "subject to lender consent," with the caveat that "there can be no assurances that such financing will be available to ATN at all"); Atlantic Tele-Network, Inc. Form 8-K, at 2. June 15, 2009, available at http://www.sec.gov/Archives/edgar/data/879585/000110465909038199/a09-15334_18k.htm (same); *see also* News Release, "AT&T Agrees to Sell Certain Centennial Communications

Verizon Wireless swap with AT&T, under which AT&T would convey Centennial properties that it did not even own (and still does not own), was announced a full month before the announcement of the proposed sale of the remaining Divestiture Properties to Atlantic Tele-Networks,[23] and, thus, at a time when the window for negotiations for the purchase of Divestiture Assets was still open. These facts strongly suggest that, rather than giving SDBs a fair opportunity, Verizon Wireless intentionally shut them out of the process.

Again, these facts warrant an investigation. And, the only way the Commission can know whether Verizon Wireless was merely indifferent to SDBs or intentionally prevented them from having a fair chance to purchase the Divestiture Assets is to conduct such an investigation. Moreover, if the Commission fails to investigate this matter thoroughly, or grants the applications without completing an investigation, it will have lost the opportunity to address Verizon Wireless's actions in a meaningful way.[24] In addition, if the investigation being conducted by the Department of Justice should lead to findings of improper conduct by Verizon Wireless and AT&T that in any way relate to the divestiture arrangement being passed on by the Commission, it could prove more difficult and costly to rectify the problem. It will do no good to grant the applications and then later admonish or fine Verizon Wireless for its actions – the divestiture will have occurred and it would be effectively impossible to unwind the transaction. This is, in fact, the last best chance for the Commission to act to afford SDBs a real opportunity to participate in the wireless marketplace and to address the questions left unanswered in the *Verizon-Alltel Order*.

Corp. Assets to Verizon Wireless," May 8, 2009, included in AT&T Notice of Ex Parte Presentations, WT Docket No. 08-246, filed May 11, 2009.

[23] *Id.*

[24] This is particularly the case because once the AT&T transaction is completed, the Commission will have lost any chance to address the Section 310(b) issues still pending in the Verizon-ALLTEL merger proceeding, as described in Section III below.

III. It Would be Arbitrary and Capricious for the Commission to Grant Consent for the Transfer of Verizon Wireless's Licenses to AT&T When the Commission Has Yet to Provide Any Reasonable Basis to Conclude That Verizon Wireless Meets the Basic Qualifications for a Wireless Licensee Under Section 310(b) of the Communications Act.

It is well established that the Commission will not approve a proposed transfer of control of a Commission licensee or assignment of Commission licenses when issues regarding the licensee's basic qualifications remain unresolved.[25] In acquiring these licenses in the first place, Verizon Wireless purported to establish its qualifications under the foreign ownership provisions of Section 310(b) through reliance upon shareholder addresses – an approach that, as CAPCC demonstrated in its prior Petition to Deny in the ALLTEL proceeding, the Commission consistently and repeatedly has rejected for anyone other than Verizon Wireless. Compliance with Section 310(b) is a basic qualification for a licensee in the Commercial Mobile Radio Service. Neither Verizon Wireless nor the Commission has yet offered any plausible rationale why Verizon Wireless is qualified to hold Commercial Mobile Radio Licenses in the first place, much less transfer them to AT&T.

"The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside."[26] In the *Verizon-Alltel Order*, however, the Commission "blithely cast aside" two policies it has consistently maintained

[25] *See Applications of SBC Communications, Inc. and BellSouth Corporation for Transfer of Control or Assignment.*, WT Docket No. 00-81, Memorandum Opinion and Order, 15 FCC Rcd 18128 (WTB/IB rel. Sept. 29, 2000); *Applications of Vodafone AirTouch and Bell Atlantic Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 11608, 11611 (WTB/IB rel. Mar. 30, 2000); *VoiceStream/Aerial Order*, WT Docket 00-3, Memorandum Opinion and Order, 15 FCC Rcd 10089, 10093-94 (citing "*MobileMedia Corporation et al.*, 14 FCC Rcd 8017 (1999) (*citing Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964))"); *see also* Stephen F. Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 339-40 (1991).

[26] *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (citing *Rainbow B'casting Co. v. FCC*, 949 F.2d 405, 408 (D.C. Cir. 1991); *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986)).

in prior decisions: its methods for evaluating foreign ownership and its policy of policing foreign ownership strictly even to the detriment of other high priority goals. Because the *Verizon-Alltel Order* strikingly conflicts with existing precedent, the Commission had an obligation to provide a reasoned explanation for applying a different standard to Verizon Wireless. As discussed below, the Commission did not provide any such explanation.

The question of Verizon Wireless's basic qualifications under Section 310(b) already is pending in two other proceedings.[27] The Commission should not grant yet a third major transfer application without directly addressing CAPCC's arguments. CAPCC submits that, if the Commission addresses the arguments CAPCC actually made, it must either (i) make its special Verizon Wireless interpretation of Section 310(b) available to SDBs and new market entrants or (ii) require that Verizon Wireless conduct a statistically valid sample survey of the outstanding voting and equity interests of its partners in which it analyzes the citizenship of the sampled shares using the same methodology through the vertical ownership chain that the Commission requires of new entrants and SDBs.

A. As Demonstrated in Pending Petitions for Reconsideration, the Commission's Approval of Verizon Wireless's Foreign Ownership Showing in the *Verizon-RCC Order* and in the *Verizon-Alltel Order* Contradicts Established Policy and Precedent Without Justifying a Departure from Settled Law.

In the *Verizon-Alltel Order*, the Commission failed to provide any reasoned analysis of its decision to allow Verizon Wireless to presume citizenship based on registered and beneficial owners' addresses of record. Instead, Verizon Wireless offered conclusory statements that the order dutifully repeated. The Commission did so despite CAPCC's demonstration that, in accepting shareholder address information, the Commission applied an entirely different and far more liberal definition of what constitutes foreign ownership under Section 310(b) than it applies

[27] *See* WT Dockets 08-95 and 07-208.

to small and socially disadvantaged businesses and other entities that compete with Verizon Wireless's media and telecommunications businesses. In issuing the *Verizon-Alltel Order* and granting special procedures and a special statutory interpretation applicable only to Verizon Wireless, the Commission acted arbitrarily and capriciously and contrary to settled law.

By departing from precedent, the Commission incurred an obligation to explain its change in policy. Approval of Verizon Wireless's reliance on shareholder addresses to meet its Section 310(b)(4) showing cannot be reconciled with the Commission's precedent for calculating foreign ownership.[28] Moreover, approval of Verizon Wireless's limited showing cannot be reconciled with the Commission's Report and Order and Third Further Notice of Proposed Rulemaking in MB Docket No. 07-294 ("*Diversity Order*"), now on reconsideration,[29] which denied far more modest relaxations of Section 310(b)(4) even for the priority goal of encouraging market entry by socially disadvantaged businesses and other small businesses.[30] "The law that governs an agency's significant departure from its own prior precedent is clear. The agency cannot do so without explicitly recognizing that it is doing so and explaining why."[31] Accordingly, the Commission's inconsistent treatment of Verizon Wireless vis-à-vis its prior treatment of Verizon Wireless's competitors, particularly SDBs, gave rise to an obligation for the Commission to recognize and provide a reasoned explanation for its apparent inconsistency.

Under established Commission policy, when evaluating an applicant's foreign ownership for purposes of Section 310(b)(4), the Commission considers "all the relevant ownership

[28] *See generally Verizon Commc'ns Inc. and América Móvil, S.A. DE C.V.*, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195 (2007) [hereinafter "*América Móvil*"].

[29] *Promoting Diversification of Ownership in the Broad. Servs.*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5949 ¶ 77 (2008), *recon. pending* [hereinafter "*Diversity Order*"].

[30] *CAPCC Petition to Deny Verizon-Alltel*, at 24-27.

interests up the vertical ownership chain including 'even small investments in publicly traded securities.'"[32] The Commission determines the principal place of business, nationality, or "home market" of underlying investors through a multi-level analysis.[33] As the Commission's *Foreign Ownership Guidelines* and the instructions to the Commission's application forms make clear, the determination of an investor's Section 310(b)(4) status under existing Commission policy requires, among other things, analysis of whether a U.S. entity is a subsidiary of a foreign entity, whether a corporation under one set of national laws is owned and voted by persons or entities of a different nationality, and whether limited partners or LLC members are "insulated" or not.[34] Thus, the interest of an investor or shareholder with an address of record in the United States or a WTO-member nation may be classified as foreign or non-WTO. In *América Móvil* – the most recent in a line of Commission decisions rejecting presumptions from investor addresses – the Commission stated unequivocally: "we decline, based on the record in this proceeding, to change

[31] *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989).

[32] *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, 22625 (IB rel. Nov. 17, 2004) [hereinafter "*Foreign Ownership Guidelines*"] (citing *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Docket Nos. IB 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23941 (rel. Nov. 26, 1997) [hereinafter "*Foreign Participation Order*"]).

[33] *América Móvil*, 22 FCC Rcd at 6217 (citing *Foreign Participation Order*, 12 FCC Rcd at 23941).

[34] *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-31; *see, e.g.*, Instructions to FCC Form 315, Section IV.H ("The Commission may also deny a construction permit or station license to a licensee directly or indirectly controlled by another entity of which more than 25% of the capital stock is owned or voted by aliens, their representatives, a foreign government or its representative, or another entity organized under the laws of a foreign country. . . . The voting interests held by aliens in a licensee through intervening domestically organized entities are determined in accordance with the multiplier guidelines [for determining attributable interests held through corporations.]").

the Commission's precedent by accepting street addresses of stockholders and banks as an indicator of citizenship of the beneficial owners."[35]

Nevertheless, in the *Verizon-Alltel Order*, the Commission approved Verizon Wireless's showing of citizenship based on shareholder addresses, stating that "[CAPCC] has not provided, and we do not discern, any basis for concluding that the information Verizon Wireless has provided is inaccurate, cannot be relied on, or is insufficient for purposes of demonstrating compliance with its foreign ownership ruling under section 310(b)(4) of the Act."[36] In the first place, this analysis reversed – for Verizon Wireless alone – decades of precedent that the applicant, *not* the petitioner, has the burden of establishing its qualifications under Section 310(b).[37]

Furthermore, contrary to the Commission's statement, CAPCC's Petition to Deny and Reply each explained why, in light of the methodology Verizon Wireless says it followed, Verizon Wireless did not conduct the analysis that the Commission requires from all other applicants.[38] Verizon Wireless itself did not deny that the review it commissioned only examined the address of the owner just one level below a pure nominee, and did not assess the underlying ownership of that entity, as it might have done in a sample survey. Thus, as CAPCC explained in detail, replete with examples, Verizon Wireless did not concern itself with whether that top-level "beneficial owner" was a U.S. corporation directly or indirectly owned or

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[35] *América Móvil*, 22 FCC Rcd at 6223.

[36] *Verizon-Alltel Order*, 23 FCC Rcd at 17544-45.

[37] *See, e.g.*, *Application of Continental Cellular for Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel) and Nineteen Rural Service Area Applications Filed by Partnerships with Alien Partners*, 6 FCC Rcd 6834, 6837 (rel. Nov. 20, 1991); *Midwest Radio-Television, Inc.*, Docket No. 18499, 24 FCC 2d 625, 626 (rel. July 31, 1970).

[38] *See CAPCC Petition to Deny Verizon-Alltel*, at 28-31; CAPCC Reply, WT Docket No. 08-95 et al., filed August 26, 2008, at 15-16.

controlled by foreign parties, a limited partnership with non-insulated alien limited partners, or even a foreign sovereign wealth fund, so long as the stockholder supplied a U.S. address, either as a "registered address" to the company or as the "registered address" supplied to a bank or other nominee holder. This is not the assessment of ultimate beneficial ownership that the Commission's longstanding precedent requires. For Verizon Wireless, the subsidiary of a foreign corporation, a limited partnership or LLC with non-insulated foreign investors, or the sovereign wealth funds of non-WTO-member nations, so long as they have supplied an address of record in the United States, each would count not only as WTO-qualified ownership and control but as wholly U.S. investment and voting rights under Section 310(b).[39] For all other applicants and licensees, in contrast, those investments would count in their entirety, regardless of registered address, as foreign investment and, unless the underlying share ownership could be traced and proven, would count as non-WTO-qualified investment.[40] Such a glaring deficiency demonstrates that the information obtained through Verizon Wireless's methodology "cannot be relied upon" and is "insufficient for purposes of demonstrating compliance with its foreign ownership ruling under section 310(b)(4) of the Act."[41]

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[39] As CAPCC previously explained, sovereign wealth funds maintain offices outside their borders. For example, Kuwait Investment Authority has an office in the United Kingdom. *See* Sovereign Wealth Fund Institute – Kuwait Investment Authority, http://www.swfinstitute.org/fund/kuwait.php (last visited July 13, 2009); Jamil Anderlini, Financial Times, *China Investment Arm Emerges from Shadows*, Jan. 5, 2008, available at www.ft.com/cms/s/0/fd0b7c6e-bb2f-11dc-9fbc-0000779fd2ac.html.

[40] *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-34.

[41] *See Verizon-Alltel Order*, 23 FCC Rcd at 17544-45. The Commission's approval of Verizon Wireless' foreign ownership showing is particularly surprising given the additional caveat in the *Verizon-Alltel Order* that "where a public company has reason to know the citizenship or principal places of business of particular beneficial owners, *e.g.*, based on notifications made pursuant to federal securities regulations, the information should be included in the company's citizenship calculations." *See id.*, n.794. The methodology approved by the Commission for Verizon Wireless, which involved the gathering of addresses from a third party, ensured that Verizon Wireless would never even have the opportunity to glance down the list of investors, thus insulating Verizon Wireless from ever seeing a shareholder name that itself would

Moreover, the Commission cannot reconcile its dramatic loosening of the foreign ownership rules just for Verizon Wireless with its *Diversity Order*, in which the Commission rejected a proposal by 29 organizations and a broadcaster coalition to open new financing resources for SDBs by relaxing existing restrictions on foreign ownership, using its authority under Section 310(b)(4). As discussed above, diversity in ownership in the telecommunications industry has long been a public policy goal of both the Commission and of Congress, and it is well-recognized that discrimination in the capital markets has handicapped minority entrepreneurs attempting to enter the rapidly consolidating telecommunications industry.[42] Nevertheless, the Commission rejected the relaxation proposed in the *Diversity Order* first, because it saw relaxation of foreign ownership restrictions as "an extraordinary step" and, second, because taking that step would require "a significant rulemaking proceeding to examine this issue in greater depth."[43] Having thus rejected any liberalization of its foreign ownership standards and policies for SDBs, the Commission cannot reasonably accede to a new liberalized standard that applies only to Verizon Wireless.

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conclusively show non-U.S. or non-WTO status, such as a non-WTO sovereign investor fund with a registered address at its Paris office.

[42] *See, e.g.*, William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (2000); Ivy Planning Group, LLC, *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing [1950 to Present]* (2000); *see also Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042, 26052 (Dep't of Justice, May 23, 1996) (DOJ proposal citing studies and Congressional hearings documenting that "widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy").

[43] *Diversity Order*, 23 FCC Rcd at 5949.